APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2295

Hubbard Broadcasting, Inc.,
Petitioner,

v.

Federal Communications Commission and The United States of America,
Respondents,

Jackson and Chaisson Broadcasting Systems, Inc. and American Broadcasting Companies, Inc.,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Submitted: June 15, 1982
Filed: August 6, 1982

Before *Heaney*, Circuit Judge, *Miller*,* Judge, and *Collinson*,** Senior District Judge.

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* The Honorable Jack R. Miller, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

** The Honorable William R. Collinson, Senior District Judge, United States District Court for the Eastern and Western Districts of Missouri, sitting by designation.

MILLER, Judge.

Petitioner Hubbard Broadcasting, Inc. ("Hubbard") seeks review under 47 U.S.C. § 402(a) of the decision and order of respondent Federal Communications Commission ("FCC") upholding dismissal on June 9, 1981, by FCC's Broadcast Bureau of Hubbard's rulemaking petition to amend FCC's rule (47 C.F.R. § 73.22 (1981)) to provide for a Class I-A "clear channel" station (KOB) at Albuquerque, New Mexico, on the AM radio frequency 770 kiloHertz ("kHz").

The FCC order not only denied Hubbard's application for review of the Broadcast Bureau's dismissal of its rulemaking petition, but also denied: (1) Hubbard's application for review of the Bureau's denial of Hubbard's related request for waiver of section 73.22 of FCC's rule (Table of Assignments) to permit Class I-A operation for Station KOB; and (2) Hubbard's application for review of the Bureau's dismissal of its application for modification of its outstanding construction permit (granted November 2, 1976) to specify nondirectional nighttime operation for Station KOB, which would be expected to follow upon favorable action on either Hubbard's petition for rulemaking or its request for waiver.[1]

The threshold issue is whether this court has jurisdiction over this appeal in view of the exception contained in 47 U.S.C. § 402(a), which provides:

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[1] It should be noted that in March of 1981 Hubbard filed a package of "inextricably intertwined" applications (FCC's description) comprising its petition for rulemaking, it application for waiver of section 73.22 of FCC's rules, and its application for modification of Hubbard's construction permit to change the facilities of KOB to accommodate a Class I-A assignment.

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. § 2342 et seq.[2]].

47 U.S.C. § 402(b) provides, *inter alia*:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> (2) By any applicant for the . . . modification of any such instrument of authorization whose application is denied by the Commission.
>
> . . . .

The facilities and status sought by Hubbard would require modification of the operation of American Broadcasting Company's Radio Station WABC (New York City) from Class I-A status, assigned to WABC by 47 C.F.R. § 73.22, to Class II-A. In dismissing Hubbard's rulemaking petition and application, the Broadcast Bureau pointed out that "[e]fforts to reclassify both KOB and WABC as directionalized Class I-B stations on 770 kHz were twice rejected by the Court of Appeals for

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[2] 28 U.S.C. § 2342 provides that the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend, or to determine the validity of all final reviewable orders of the FCC. 28 U.S.C. § 2343 provides that "[t]he venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." Hubbard's principal office is in St. Paul, Minnesota.

the District of Columbia Circuit,[3] on the grounds that disparate treatment of the three network flagship stations [WNBC, WCBS, and WABC], entailed by directionalizing WABC, could not be justified."

In 1952, Congress amended section 402 to "make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to the United States Court of Appeals for the District of Columbia." S. Rep. No. 44, 82d Cong., 1st Sess. 11 (1951); *see* H.R. Rep. No. 1750, 82d Cong., 2d Sess. 2-3, 16 (1952). In accordance with this stated purpose, the courts generally have required that appeals be taken under section 402(b) where the Commission's action bears a "close functional similarity" to the types of cases enumerated under that section,[4] or is "ancillary" to,[5] or "in aid of,"[6] or "intimately associated with"[7] the FCC licensing authority.

Hubbard cites *Campos v. FCC*, 650 F.2d 890, 893 (7th Cir. 1981), for its statement that "it is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories," citing *FCC v.*

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[3] *Hubbard Broadcasting, Inc. v. FCC*, 564 F.2d 600 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Hubbard Broadcasting, Inc. v. FCC*, 663 F.2d 220, 223 (D.C. Cir. 1980).

[4] *Metropolitan Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955). *See Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

[5] *Tomah-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962); *Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959).

[6] *Cook, Inc. v. United States*, 394 F.2d 84, 87 (7th Cir. 1968).

[7] *WHDH, Inc. v. United States*, 457 F.2d 559, 561 (1st Cir. 1972).

Columbia Broadcasting System, 311 U.S. 132 (1940). However, the quoted statement is dictum, and the cited case merely calls for a "clear-eyed" reading of section 402(b). Moreover, the Seventh Circuit panel appears to have overlooked the later case of *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), wherein, consistent with the Congressional purpose, the court said that, in determining whether an FCC order is appealable under section 402(a) or section 402(b), "it is the substance of what the Commission . . . has done which is decisive."

Hubbard also cites *New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119, 1121 (3d Cir. 1978), wherein the court held that it had jurisdiction under section 402(a) to review the results of an informal rulemaking proceeding in which FCC terminated an inquiry into the adequacy of television service in the State of New Jersey. This, of course, is unlike the case before us.

In view of the foregoing, and after considering all arguments of the parties and intervenor American Broadcasting Companies, Inc., we are persuaded that FCC's denial of Hubbard's "package" of applications was, as a matter of substance, the exercise by FCC of its "radio-licensing power" reviewable under section 402(b); further, that to permit Hubbard to split off a part of the "package" in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia, which has twice ruled against reclassifying KOB and WABC as directionalized stations on 770 kHz, would frustrate the clear intent of Congress that judicial review of all cases involving FCC's "radio-licensing power" be limited to the United States Court of Appeals for the District of Columbia.

Accordingly, we hold that this court does not have jurisdiction over this appeal.

The appeal is, therefore, dismissed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. BMP-810309AG

In the Matter of

Amendment of § 73.22, Table of Assignments, AM Broadcast Stations, to "Assign" the frequency 770 kilohertz to Albuquerque, New Mexico, for Class I-A operation

and

Application of Hubbard Broadcasting, Inc. for Modification of AM Broadcast Station KOB, Albuquerque, New Mexico

MEMORANDUM OPINION AND ORDER

(Adopted: September 30, 1981; Released: October 5, 1981)

BY THE COMMISSION: COMMISSIONERS QUELLO AND WASHBURN CONCURRING IN THE RESULT; COMMISSIONER RIVERA DISSENTING.

1. Before the Commission are two applications for review filed by Hubbard Broadcasting, Inc. ("Hubbard"), licensee of Class II-A AM Station KOB, Albuquerque, New Mexico. Because they both relate to the same issue, they are considered together herein. Also under consideration are a pleading filed by American Broadcasting Companies, Inc. ("ABC"), licensee of Class I-A AM

Station WABC, New York, New York, in opposition to the applications for review, and Hubbard's reply to this opposition.

2. Briefly, the events leading up to the present applications are as follows. On March 9, 1981, Hubbard filed a petition for rule making asking that § 73.22(a) of the Commission's rules be amended to reflect a Class I-A assignment on 770 kHz in New Mexico and a co-channel Class II-A assignment in New York, New York.[1] Hubbard also filed an application for Station KOB to operate as a Class I-A facility on 770 kHz at the same time. Accompanying the application was a request for waiver of § 73.22(a).[2] Both the application and petition for rule making were dismissed by letters from the Chief of the Broadcast Bureau, on June 9, 1981. Copies of these letters are attached hereto as Appendices A and B. Hubbard now applies for Commission review of the Bureau actions. ABC argues that Hubbard has raised insufficient grounds for review and that dismissal of the

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[1] The present rule reflects a Class I-A station on 770 kHz in New York and a co-channel Class II-A assignment in New Mexico. A Class I-A station is an omnidirectional, unlimited-time 50 kW facility operating on a clear channel. A Class II-A station is a 50 kW, unlimited-time AM station on a clear channel that receives interference from the dominant Class I stations and may be required to directionalize to avoid interference to Class I stations.

[2] *See*, § 73.21 of the Commission's Rules. Because Hubbard seeks an amendment to § 73.22(a) that would only apply to Station KOB, we agree with the Bureau's letter, and ABC's opposition to the applications for review, that the request for waiver of § 73.22(a) and the petition for amendment to § 73.22(a) are functionally equivalent. We therefore regard the applications for review as complaining of one action and treat them accordingly herein.

petition and application was procedurally and substantively correct.

3. In essence, Hubbard seeks Class I-A status for Station KOB, its latest campaign in a controversy that has been before the Commission and the courts for the past 40 years. Currently, KOB is a Class II-A station, required to directionalize its signal to protect the service area of Class I-A Station WABC. Since 1941, when international agreement required the removal of KOB's operation to 770 kHz, it has sought omnidirectional operation on that frequency. As we said in the *Further Notice of Proposed Rule Making* in the recently concluded clear channel proceeding: "No other station assignment among the thousands so far established has approached this one in the length, complexity and thoroughness that has been accorded in adjudicatory and rule making proceedings before the Commission and in repeated judicial reviews." 70 F.C.C.2d 1077, 1107 (1978). A complete inventory of the various proceedings addressing the KOB issue would be unnecessarily repetitive as well as confusing. What follows is a brief example of the detail with which this dilemma has been considered.

4. In 1944, the Commission instituted a proceeding, concluded in 1958, that established a Class I-B, directionalized sharing of 770 kHz by WABC and KOB. The Court of Appeals for the District of Columbia, in *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 280 F.2d 631 (D.C. Cir. 1960), directed the Commission to look into the disparity in treatment of the network flagship radio stations (WNBC and WCBS remaining Class I-A, while WABC would be required to directionalize as a Class I-B facility) resulting from the Class I-B allocation to KOB. In 1963, the Commission announced its

determination that the disparity was justified by the relevant considerations and maintained the Class I-B pairing on 770 kHz. 35 F.C.C. 36 (1963). The Court again objected, in *American Broadcasting-Paramount Theatres v. FCC*, 345 F.2d 954 (1965), returning the issue of equalization of treatment of the network flagship stations to the Commission for further proceedings. In 1976, concluding a 1969 rule making in which all possible alternatives were considered, the Commission found it in the public interest to specify the present allocation scheme, that is, Class I-A operation in New York and Class II-A operation in New Mexico on 770 kHz. 59 F.C.C.2d 32 (1976). This result was affirmed *per curiam* without opinion by the Court. *Hubbard Broadcasting v. FCC* (Case No. 76-1476) (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1605 (1978).

5. Hubbard sought consideration of the issue again in Docket 20642, the clear channel rule making. In the *Further Notice, supra*, the Commission generally rejected the I-B pairing concept, stating that:

> . . . the gains achieved at the cost of dislocating longstanding service by the Class I-A stations would generally fail to achieve today's goal of service from radio stations able to orient broadcasts to the needs of persons living relatively nearby. (70 F.C.C.2d, at 1079)

As recently as 1980, the D.C. Circuit affirmed the Commission's dismissal of a Class I-A application for KOB. *Hubbard Broadcasting v. FCC* (Case No. 79-1549) (D.C. Circuit 1980). The present developments appear to belie the Court's conclusion that:

> . . . this forty year old controversy is finally brought to an end.

6. Hubbard's principal contention on review is that the Bureau erred in rejecting Hubbard's argument that current demographic trends would justify yet another examination of whether KOB should be permitted omni-directional operation. We concur with the Bureau Chief's response that recent population shifts from the northeast to the southwest indeed have been considered in recent AM allocation proceedings. Although Hubbard disputes it, our policy favoring additional local and primary service as opposed to secondary service, in concert with our awareness of current population patterns, influenced our decision to provide for additional duplication of the clear channels. *See, Clear Channel Broadcasting in the AM Broadcast Band, Further Notice of Proposed Rule Making, supra*; and *Report and Order*, 78 F.C.C.2d 1345 (1980); *also see, Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963). We are mindful of the white area coverage that Hubbard claims its proposal would provide; however, we believe that among the various means of facilitating white area coverage (including Class C FM stations) Hubbard's proposal is not necessarily the most desirable, in light of the other AM reallocations it would entail. It is well established that the Commission has broad discretion in fashioning allocation schemes in the public interest, particularly where there exist mutually exclusive demands for scarce spectrum. *See, Coastal Bend Television Co. v. FCC*, 234 F.2d 686, 690 (D.C. Circuit 1956). We find no need to further discuss the merits of Hubbard's arguments in favor of acceptance of the rule making petition, because we concur with the Bureau Chief's letter dismissing the petition. *See*, Appendix A.

7. As a procedural matter, we disagree with Hubbard's contention that the Bureau Chief did not possess the

authority to dismiss the rule making petition. The petition was dismissed as moot, repetitive and not warranting consideration by the Commission under § 1.401(e) of the Commission's Rules; it was not accepted under § 1.403. Section 0.281(b)(6) instructs the Bureau Chief to refer to the Commission "... petitions for rule making *which have been accepted under Section 1.403* . . ." (emphasis supplied). We agree with ABC that the Bureau Chief acted within his authority and correctly in dismissing the subject petition for rule making.

8. Accordingly, pursuant to authority contained in § 303 of the Communications Act of 1934, as amended, and § 1.115 of the Commission's Rules, IT IS ORDERED, That the Applications for Review of Hubbard Broadcasting, Inc. ARE DENIED.

9. For further information, contact Molly Pauker, Broadcast Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION,

William J. Tricarico, *Secretary.*

Appendix A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

June 9, 1981

In Reply Refer To:
8610

Frank U. Fletcher, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

Dear Mr. Fletcher:

This is in reference to the petition for rule making filed by your office on behalf of Hubbard Broadcasting, Inc.,

licensee of Station KOB, Albuquerque, New Mexico. You seek amendment of Section 73.22 of the Commission's Rules, to permit Class I-A operation for Station KOB. Currently, Section 73.22 provides for a Class I-A station in New York, New York, and a co-channel Class II-A station in New Mexico. Class II-A stations are required to directionalize to protect specified contours of co-channel Class I-A stations. The proposed change also would entail modifying the operation of Station WABC, New York, New York, from Class I-A to Class II-A, as both KOB and WABC operate on 770 kHz. Alternatives, including the feasibility of removing KOB to another channel, were explored and rejected as impossible in Docket No. 6741, *Clear Channel Broadcasting*, 59 F.C.C. 2d 32 (1976). Accordingly, it is evident that in no manner may both Stations KOB and WABC be operated as omnidirectional Class I-A stations.

Your principal argument in favor of Class I-A status for KOB is that recent population growth in the Southwestern United States, as well as concomitant population decline in the Northeast, and particularly New York, would justify reallocation of operations on Channel 770, under Section 307(b) of the Communications Act of 1934, as amended. The Commission has recognized the demographic trend that has resulted in increased population in the Southwest. Indeed, the 1961 duplication on the Class I-A channels and authorization of Class II-A assignments thereon had the effect of accommodating the growth pattern. See *Clear Channel Broadcasting*, 31 F.C.C. 656 (1962). Moreover, the recent decision in Docket No. 20642, *Clear Channel Broadcasting*, 78 F.C.C.2d 1345 (1980), permits further duplication on the Class I-A channels, and that decision thereby facilitates additional primary service in the Southwest.

In this regard, data submitted with your request indicates that the principal service gain from modification of KOB's status from II-A to I-A would be secondary service. However, provisions of secondary skywave service is not a primary objective of the Commission's current AM allocations policy. *Clear Channel Broadcasting*, 78 F.C.C.2d 1345 (1980). Additionally, the new primary service Class I-A operation by KOB would provide would not offset the loss of primary service by WABC caused by its modification to Class II-A status.

Finally, the initial modification of KOB's original omnidirectional Class I status on Channel 1180 under the North American Regional Broadcasting Agreement was beyond the Commission's control and gives rise to no entitlement that KOB be restored to its original position. In protracted proceedings over the last four decades, the Commission has attempted to find a solution to the controversy between KOB and WABC that satisfies both parties, as well as best serves the public interest. Efforts to reclassify both KOB and WABC as directionalized Class I-B stations on 770 kHz were twice rejected by the Court of Appeals for the District of Columbia Circuit, on the grounds that disparate treatment of the three network flagship stations, entailed by directionalizing WABC, could not be justified.

I believe your petition somewhat mischaracterizes the Commission's interpretation of the Court of Appeals pronouncements in this matter. We agree that the rulings that Station WABC should not be treated differently from the other two network flagship stations does not necessarily control our present review of Station KOB's status. However, we cannot disregard the Court's previous decisions in our present deliberations.

We could grant the relief you seek without directionalizing the other two network flagship stations in New York City, to maintain parity with WABC. As we decided in Docket No. 6741, the service loss entailed by directionalizing all three network flagship stations cannot be offset by making KOB omnidirectional. The Bureau finds in your petition no new grounds that persuade us to alter the conclusions the Commission reached on these issues in 1976.

For the above reasons, the Broadcast Bureau is dismissing without prejudice your petition for rule making on behalf of Hubbard Broadcasting, Inc. pursuant to Sections 0.281(b)(6) and 1.401(e) of the Commission's Rules. I note that we have not taken into account in our deliberations the responsive pleadings filed by Jackson and Chaisson Broadcasting Systems, Inc., and ABC, or your Replies, because we have not formally accepted your petition.

Please be advised that you may seek reconsideration of this action pursuant to Section 1.429 of the Commission's Rules by filing an appropriate petition within thirty (30) days from the date of this letter.

Sincerely,

Richard J. Shiben
Chief, Broadcast Bureau

Appendix B

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Reply Refer To:
8910-AGM

Hubbard Broadcasting, Inc.
77 Broadcast Plaza
Albuquerque, New Mexico 87103

In re: Hubbard Broadcasting, Inc.
KOB, Albuquerque, New Mexico
BMP-810309AG

Gentlemen:

This concerns (1) your above-referenced application to modify an outstanding construction permit (BP-20,935, as modified, granted November 2, 1978) to specify non-directional nighttime operation, and (2) your related request for waiver of Section 73.22 of the Commission's Rules to permit Class I-A status for station KOB. As with your concurrent petition for rule making, the facilities and status you seek by rule waiver would entail modifying the operation of station WABC, New York, New York, from Class I-A to Class II-A.

The waiver would of course represent a de facto amendment of Sections 73.22, and sufficient grounds for such a waiver would be essentially identical to those for a formal rule amendment. If anything, waiver would require an even more compelling showing, since it would not have the public-participation procedures of a rule making proceeding.

By separate correspondence, your petition for rule making is being dismissed. Your request for waiver of Section 73.22 contains no compelling arguments not

set out in your petition, and it must also be denied. Consequently, your application for non-directional nighttime operation is dismissed for violation of Sections 73.22 and 73.182 of the Commission's Rules.

Sincerely,

Richard J. Shiben
Chief, Broadcast Bureau

cc:

American Broadcasting Companies, Inc.
Peter V. Gureckis & Associates
Ralph J. Bitzer
Jackson & Chaisson Broadcasting System, Inc.
Faye & Richard Tuck, Inc.
Eugene T. Smith
Robert Jones
Century Broadcasting Corporation
Fred W. Volken
Kirkland & Ellis
Dontron, Inc.
Miller & Fields
Edward F. Lorentz & Associates
Plano Broadcasting Corporation
Cole, Raywid & Brauerman
Latin American Broadcasting Co.
Robert L. Purcell
Cohn and Marks
E. Harold Munn, Jr.
KXA, Inc.
Haley, Bader & Potts
Hatfield & Dawson
Bluebonnet Radio Broadcasters, Inc.
Smith & Pepper

APPENDIX C
(Attachments Omitted)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RM-

In re

Amendment of Section 73.22 Table of Assignments, Standard Broadcast Stations, to "Assign the Frequency 770 Kilohertz to Albuquerque, New Mexico, for Class I-A Operation.

Directed to: **The Commission**

PETITION FOR RULEMAKING

Hubbard Broadcasting, Inc., licensee of standard broadcast station KOB, Albuquerque, New Mexico, respectfully requests that the Commission's AM "Table of Assignments"[1] be amended as follows:

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[1] To petitioner's knowledge, the instant petition is the first petition for "AM rulemaking" presented to the Commission. Petitioner has endeavored to comply with the Commission's rules for FM and TV rulemaking since there appear to be no specific rules concerning "AM rulemaking." For example, a copy of this petition will be served on ABC even though the Commission's rules require this only in cases of "[p]etitions for amendment of the FM . . . or the Television Table[s] of Assignments." 47 C.F.R. § 1.401(d).

§ 73.22 Assignment of Class II-A stations.

(a) Table of assignments. One Class II-A station may be assigned on each channel listed in the following table within the designated State or States:

Channel (Kilohertz)	*Location of existing class I station*	*State(s) in which class II-A assignment may be applied for*
	* * *	
770	Albuquerque, N.M.	New York
	* * *	

In support, the following is submitted:

1. Petitioner seeks "reassignment" of 770 kHz to Albuquerque, New Mexico for Class I-A operation.[2] Amendment or waiver[3] of Section 73.22 is necessary

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[2] Class I-A stations are generally those which operate with 50 kw nondirectionally and, thus, are "designed to render primary and secondary [or skywave] service over an extended area and at relatively long distances." 47 C.F.R. § 73.21(a)(1) (1979). Class I-B stations also render primary and wide-area secondary service; however, since I-B stations are directionalized and are not protected from interference to the extent that I-A stations are, I-B's offer more limited secondary service. As the Commission has recognized, of the more than 4,500 radio stations in the country, only those few I-A and I-B stations can provide wide-area secondary service since they are the only stations which "receive protection which enables them to render nighttime skywave service" beyond their primary service areas. *Clear Channel Broadcasting in the Standard Broadcast Band*, ___ F.C.C.2d ___, 48 P & F Radio Reg. 2d 1077, 1105 (1980) [hereinafter *1980 Clear Channel Report and Order*].

[3] Hubbard is filing simultaneously with this petition an application and request for waiver which also seeks allocation of 770 kHz for Class I-A operation at Albuquerque, New Mexico. The application has proven necessary because of the application of Jackson and Chaisson Broadcasting, Inc., for a Class II-A facility on 770 kHz at Lafayette, Louisiana. If accepted, the Hubbard I-A application would also be mutually exclusive with the application of the American Broadcasting Companies, Inc., for renewal of license of station WABC, New York City, New York.

since the Commission contends that Section 73.22, in a clear departure from the traditional system of AM allocations, "assigns" the frequency 770 kHz to New York City for Class I-A operation. *Hubbard Broadcasting, Inc.*, ___ F.C.C.2d ___, 44 P&F Radio Reg. 2d 1005 (1979), *reconsideration denied*, 45 P&F Radio Reg. 2d 780 (1980).

2. The United States Court of Appeals for the District of Columbia Circuit recently agreed, *Hubbard Broadcasting, Inc. v. Federal Communications Commission*, ___ F.2d ___ (Case No. 79-1549, decided December 29, 1980), and, thus, upheld the Commission's dismissal of a Class I-A application filed by Hubbard in 1978, which specified I-A operation in Albuquerque, since the "station allocation . . . made [by Section 73.22] should be maintained until a waiver is granted or until the rule is amended." *Sl. Op.* at 7 (footnote omitted). In accordance with this decision, and in view of the changed circumstances detailed herein, Hubbard now requests "reassignment" of 770 kHz.

I. Background

3. As the Commission is well aware, the controversy over the use of 770 kHz has continued off and on for nearly 40 years. In 1941 both KOB[4] and WABC[5] were

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[4] KOB was first licensed in 1922 by the Department of Commerce. In 1928 the Federal Radio Commission assigned KOB the frequency 1180 kHz with 10 kw of power. In 1940 the Commission authorized KOB to increase power to 50 kw and designated KOB a Class I station, the only facility licensed to operate at night on 1180 kHz. *American Broadcasting Co. v. Federal Communications Commission*, 191 F.2d 492 (D.C. Cir. 1951).

[5] WABC, then known as WJZ, appears to have been originally licensed to Boundbrook, New Jersey, on 660 kHz with 30 kw

[footnote continued]

displaced from their operating frequencies as a result of the North American Regional Broadcasting Agreement. 55 Stat. 1005 (1937). The Commission moved WABC to 770 kHz, *Federal Communications Commission, Sixth Annual Report* 45 (1940), and after some experimentation on another frequency, the Commission on its own motion also moved KOB to 770 kHz "temporarily," *American Broadcasting Co. v. Federal Communications Commission*, 191 F.2d at 495.

4. This mutual displacement gave rise to several decades of controversy over the use of the frequency, which itself became enmeshed in a general Commission inquiry concerning the status of all clear channel stations. At the end of its lengthy general inquiry, the Commission decided in 1961 that the public interest, and in particular the interests of the largely underserved Southwest, would be best served by the so-called "duplication" of 13 of the 25 clear channel frequencies. *Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 656 (1961) [hereinafter *1961 Report and Order*].

5. In effect, this meant that the 13 clear channel stations would no longer have exclusive high-power use of the frequencies at night, but, rather, that the 13 clear channels would be "cleared for licensing of a subordinate

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of power. *Federal Radio Commission, Second Annual Report* 58, 92 (1928). In 1928, the Federal Radio Commission moved the station to 760 kHz, *id.*, at 184, 102, where it remained until displaced by the North American Regional Broadcasting Agreement. WABC is now licensed to the American Broadcasting Companies, Inc., which also operates four national radio networks with hundreds more affiliates than either the National Broadcasting Companies, Inc. or CBS, Inc., which operate only one network each. See *Proposal of American Broadcasting Companies, Inc. to Establish Four New Specialized "American Radio Networks,"* 11 F.C.C.2d 163 (1967).

broadcaster at night." *WAIT Radio v. Federal Communications Commission*, 459 F.2d at 1205. The duplication would be accomplished, the Commission decided, with the licensing of so-called Class II-A stations to operate at night on the selected frequencies at locations sufficiently distant and at powers low enough so that the Class II-A stations would not interefere with the dominant Class I facilities on their frequencies, and the Commission adopted specific licensing procedures for accomplishing the duplication. *1961 Report and Order* at 578-79.

6. The status of 770 kHz was specifically unaffected by the *1961 Report and Order*, 31 F.C.C. at 593-97, and the Commission instituted yet another parallel proceeding to decide the status of the frequency. In 1963, the Commission reached the same conclusion it had in 1958 regarding the use of 770 kHz: that the public interest would best be served by allowing KOB and WABC to operate as Class I-B stations, each protecting the signal of the other. The Commission reasoned in accordance with the fundamental requirements of Section 307(b) of the Communications Act,[6] that the "gain of KOB's primary and secondary service to be realized in unserved and underserved areas would more than offset the losses of WABC in terms of the overall public interest." *Hubbard Broadcasting, Inc.*, 35 F.C.C. 36, 40 (1963).

7. On appeal, however, the United States Court of Appeals reversed the Commission's determination. *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 345 F.2d 954

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[6] 47 U.S.C. § 307(b) (1970) [hereinafter Section 307(b)]. *See infra* at 6-7.

(D.C. Cir. 1965). The court found that WABC should be given "equitable" channel treatment vis-a-vis the "flagship" stations of the NBC and CBS networks, 345 F.2d at 960, and suggested that the Commission re-evaluate its conclusions concerning the service needs of the Southwest in light of then-new services as well as "other changed conditions," 345 F.2d at 959 (footnote omitted).

8. This gave rise to another series of administrative proceedings, and 11 years later the Commission sought to resolve the problem simply by adding 770 kHz to the list of duplicated channels and recognizing, at least for the time being, WABC as the dominant Class I station while relegating KOB to Class II-A status. *Clear Channel Broadcasting in the Standard Broadcast Band*, 59 F.C.C.2d 32 (1976) [hereinafter *1976 Report and Order*]. In recognition of this decision, Hubbard then filed a competing application—specifying *for the first time* Class I-A operation in Albuquerque—against WABC's application for renewal of license which was then pending before the Commission. The Commission, however, denied Hubbard a hearing on its competing application, indicating that Hubbard, in order to compete with WABC would first be obliged to seek a waiver or amendment of Section 73.22(a). This position was eventually sustained by the Court of Appeals, and, accordingly, Hubbard is now seeking both a waiver of the Commission's rules and "reassignment" of the Class I-A station on the frequency 770 kHz.

II. Applicable Legal Standards

9. As the Commission has historically recognized, assignments and reassignments of radio channels are made

on the basis of relative need of service. These relative needs

> are weighed primarily in light of the number of facilities already in each of the communities and the populations of these communities. The relative needs of the proposed service areas for the services to be received are weighed in terms of the relative populations and extent of the areas proposed to be served and the number of services presently available to these areas, or portions of them.

Radio Greenbrier, Inc., ___ F.C.C.2d ___, 46 P&F Radio Reg. 2d 1467, 1470-71 (Rv. Bd. 1980); *see Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 17 P&F Radio Reg. 2d 1646, 1647-48 (1969).

10. This careful balancing of relative need is, of course, required by the strictures of Section 307(b) of the Communications Act, which provides that in considering applications for modifications and renewals of licenses, the Commission "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *See Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 17 F.C.C.2d 493 (1969).

11. Moreover, this Section 307(b) determination is not a decision to be made only at the time of a station's original licensing. Rather, as the Court of Appeals has reminded the Commission, no such assignment of a facility, presumably even those granted to networks, can be taken as a "permanent" grant in light of the requirements of Section 307(b). *Pasadena Broadcasting Co. v. Federal Communications Commission*, 555 F.2d

1046 (D.C. Cir. 1977). In that case, the Commission asserted that "preexisting broadcast stations can be maintained even though their continuance does not satisfy the strictures of § 307(b)." 555 F.2d at 1051 n.39. However, the court found the Commission's position "belied by the face of the statute, which applies not only to changes in the structure of spectrum allocations, such as grants of new licenses or modifications, but to license renewals as well." *Id.* As the court stated, satisfaction of Section 307(b) "is not, nor ought to be a one-time thing, for the balance of demand for service will shift among communities over time," and it is the Commission's obligation reasonably to respond to these shifting demands. *Id.*

III. Argument

12. KOB's I-A operation in Albuquerque[7] in the accompanying application, would actually promote Section 307(b) and the policies underlying the Commission's clear channel rules. Even assuming the validity of the Commission's 1976 decision to "assign" 770 kHz for I-A operation in New York,[8] which was based on

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[7] Albuquerque is the largest city in New Mexico, with a population estimated by the 1980 census to be 328,837. It is located in Bernalillo County, which, according [to] preliminary 1980 census data, has a population of 414,804. Albuquerque is served locally by five daytime-only AM stations, six unlimited-time AM stations (only two of which have nighttime authority in excess of 500 watts), five FM stations, four non-commercial FM stations, four commercial television stations and one non-commercial television station. *Broadcasting Yearbook*, B-117, C-146-C-147 (1980 vol.).

[8] According to preliminary census data, New York City has a 1980 census of 7,035,348. It is served locally by three Class I-A

[footnote continued]

1970 census data, the recent and dramatic shifts in population reflected in the 1980 census compel the Commission to reassess its 1976 "assignment" in light of the Hubbard proposal. Moreover, "reassignment" of 770 kHz would bring needed radio service to large rural parts of the West and Southwest, thus promoting the underlying basis of the Commission's clear channel service.

A. *"Reassignment" Will Promote The Policies Underlying Section 307(b)*

13. As indicated above, the overriding consideration in balancing the relative need of communities for radio facilities is the requirement of Section 307(b) that radio "licensees, frequencies, hours of operation, and . . . power" be distributed "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Moreover, the intent of Section 307(b) has been found to be primarily to allow sparsely populated areas "especially in the West and Middle West" to secure facilities "to meet the demands of that section of the country." 80 *Cong. Rec.* 6032 (1936).

14. However, as the Commission has historically recognized, the Western and Southwestern areas of the United States still suffer from a relative deprivation of radio service. For example, the so-called "white areas"

AM stations, two Class I-B AM stations, one daytime-only AM station, 12 unlimited-time AM stations (including one non-commercial AM and two operating with 50 kw), 12 commercial FM stations, seven non-commercial FM stations, six commercial television stations and three non-commercial television stations (including WNET (TV)). *Broadcasting Yearbook*, B-118-B-119, C-115-C-156 (1980 vol.).

of the country are located overwhelmingly in the Western States while only a few areas of the Northeast, Southeast and North Central States lack primary service. *1980 Clear Channel Report and Order* at 1120.[9]

15. This relative disparity of radio service is further illustrated by the Commission's distribution of Class I-A channels. As the attached map and listing illustrate, 23 Class I-A stations are located in states lying in the Eastern and Central time zones, while only 2 Class I-A stations—KFI, Los Angeles, and KSL, Salt Lake City—are located in the Mountain and Pacific time zones. *See* Attachment 2; *see also 1980 Clear Channel Report and Order* at 1105. As the map dramatically illustrates, all but a handful of Class I-A stations are located in the Northeast quadrant[10] of the United States, and many parts of the Northeast fall within the 750-mile radii of as many as 20 Class I-A stations. In contrast, much of the West or Southwest falls within the 750-mile radii of only one or two Class I-A stations or, in some cases, no such stations at all.[11]

16. In the past, and certainly when most of the I-A stations were licensed in their present locations, this

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[9] The "white area" map relied on by the Commission in the *1980 Clear Channel Report and Order* is appended hereto as Attachment 1.

[10] As used herein, "Northeast quadrant" refers to the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Michigan, Indiana, Kentucky, Wisconsin, Illinois, Minnesota, Iowa, and Missouri, as well as the District of Columbia.

[11] This disparity was also hinted at by the Commission in the *1980 Clear Channel Report and Order* where the Commission noted that most Americans are secondarily served by "between 4 and 20" Class I-A signals. 47 P&F Radio Reg. 2d at 1105; *see also Hubbard Broadcasting, Inc.*, 35 F.C.C. 36, 40 (1963).

disparity of service might have been explained as necessary to provide the largest segment of the population, then located primarily in the Northeast, with the largest block of radio service. In 1930, for example, the states of the Northeast quadrant comprised 61.51 per cent of the nation's population (75,581,750 persons of a total of 123,202,624). *U.S. Department of Commerce, Characteristics of the Population* 1-48 (1970). In fact, the population of New York State alone accounted for 10.22 per cent of the total population. *Id.*

17. However, population figures no longer support the continued licensing of the overwhelming majority of Class I-A stations in the Northeast. In fact, census data recently released by the Census Bureau reveal a significant and growing transmigration of people toward the West and Southwest. For example, the population growth from 1970 to 1980 in the West, including New Mexico, averaged 23.9 per cent, while the Middle Atlantic states, including New York, averaged a 1.1 per cent loss over the past decade. *See* Attachment 3. In addition, while those states in the Northeast quadrant which have I-A "assignments" averaged only a 3.49 per cent growth rate over the past ten years,[12] those in Mountain and Pacific states without Class I-A facilities averaged 33.36 per cent.[13]

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[12] These are the states of Minnesota (7.1 per cent), Iowa (3.1 per cent), Missouri (5.1 per cent), Illinois (2.8 per cent), Michigan (4.2 per cent), Ohio (1.3 per cent), Kentucky (13.17 per cent), Pennsylvania (0.6 per cent), New York (-3.8 per cent) and Massachusetts (0.18 per cent). Of these states, only Kentucky's growth rate exceeded the national average of 11.4 per cent.

[13] These are the states of Montana (13.3 per cent), Idaho (32.4 per cent), Wyoming (41.6 per cent), Colorado (30.17 per cent), New Mexico (27.8 per cent), Arizona (53.1 per cent), Washington (21.0 per cent), Oregon (25.9 per cent), Alaska (32.4 per cent) and Hawaii (25.3 per cent).

18. Nor are the actual population figures of the Mountain and Pacific states insignificant. Rather, the data shows the combined populations to be 43,165,199 as compared with a total population of 119,071,062 for the states of the Northeast quadrant. Thus, while the Northeastern states comprise less than 53 per cent of the population, they have located within their borders 72 per cent of the available Class I-A stations. Further, while the Western States comprise more than 19 per cent of the population, they have only 8 per cent of the available Class I-A stations.[14]

19. Moreover, these population trends may be expected to continue. For example, the Economic Unit of *U.S. News and World Report* estimates that the Mountain states of Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona and New Mexico will register an average population increase of 24 per cent from 1977 to 1987, the highest of any region in the country. *U.S. News and World Report* 60 (May 30, 1977). On the other hand, it is estimated that the Middle Atlantic states of New York, New Jersey and Pennsylvania over the same period will show an increase of only three per cent, the lowest growth rate of any region. *Id.*

20. The data are even more dramatic in the specific comparison of New York and New Mexico. While New York posted population *loss* of 3.8 per cent or, 684,103 of its residents from 1970 to 1980, the largest loss of any state, New Mexico's population grew by 27.8 per cent, or, 282,913. In addition, preliminary figures

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[14] As detailed herein, this disparity in I-A distribution is heightened by the fact that clear channel stations were intended to serve the relatively sparsely populated areas of the country. *See infra* at 15-16.

released by the Census Bureau show New York City's population to have declined from 7,895,563 in 1970 to 7,035,348 in 1980, a loss of 10.89 per cent.[15] *See* Attachment 4. In the same period, however, Albuquerque's population has increased from 244,501 in 1970 to 328,837 according to preliminary 1980 census data, an increase of 34.5 per cent. *See* Attachment 6 at Figure 8.[16] Yet, New York City has three Class I-A stations licensed to it and is within the secondary service area of at least 12 other I-A stations. By contrast, Albuquerque has no I-A facility licensed to it and is only in the outer reaches of four I-A stations.

21. Nor does the fact that new, low-power stations have been licensed to New Mexico ameliorate the increasing need for reliable high-power service in the West. *1976 Report and Order* at 42-43. Initially, such an argument ignores the relative growth of services elsewhere, a comparison crucial to evaluation of need under Section 307(b). Thus, while it may be true that the Commission since 1965 has licensed 37 new stations in New Mexico, the Commission has also licensed at least 117 stations in New York—a state with a declining population—in the same time period. *Broadcasting Yearbook* C-146-C-160 (1980 vol.).

22. Moreover, despite the addition of a low-coverage station here and there in New Mexico, Hubbard's proposed change from II-A to I-A operation would mean a gain in primary service of 245,400 persons. Attachment

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[15] Hubbard will supplement the instant petition with final data when they are released by the Commerce Department.

[16] Attachment 6 is engineering data compiled by Lohnes & Culver, consulting engineers, and submited with Hubbard's I-A application.

6, Figure 8. This represents a white area gain of 97,900 persons who have no other primary aural service and a gray area gain of 27,600 persons who have only one other primary aural service. *Id.*

23. In this regard, the instant situation seems analagous to *Radio Cincinnati, Inc. v. Federal Communications Commission*, 177 F.2d 92 (D.C. Cir. 1949), which also involved the relative needs of two communities. There, stations in Lansing, Michigan and Cleveland, Ohio, sought mutually exclusive facilities, and the court upheld the Commission's grant to the Lansing station. The court emphasized that Lansing had only one station while Cincinnati had "*five fulltime* stations." 177 F.2d at 95 (emphasis in original). In addition, the court found of "vital" significance

> the conceded fact that the proposed additional coverage by [the losing applicant] would reach no area or person not already served by some radio station, whereas the proposal of [the winning applicant] would serve 5,000 persons in the same area of 550 square miles who are now without primary broadcast service during the daylight hours.

Id. Indeed, the instant proposal is even more compelling in that it will also provide needed secondary service to the West and Southwest. See *infra* at 16-17.

24. Moreover, Hubbard submits that 770 kHz is the most appropriate channel for Hubbard to seek I-A authority on. KOB has operated on 770 kHz since 1941 and is presently authorized as the only Class II-A station on the frequency. Thus, the Commission could serve the requirements of Section 307(b) while causing the minimum amount of disruption of existing service.

25. Finally, the present time seems to be the most appropriate since WABC's current license expires June 1,

1981. While ABC has filed for renewal of the license of WABC, processing of the renewal "assumes the continued availability of the channel," and such continued availability "under the scheme of the Act as a whole, is subject to action of the Commission in a rule making proceeding." *Transcontinent TV Corp. v. Federal Communications Commission*, 308 F.2d 339, 344 (D.C. Cir. 1962). *See Petition to Reallocate VHF-TV Channel 9 from New York, New York to a City Within the City Grade Contour of Station WOR-TV*, ___ F.C.C.2d ___, para. 16 (FCC 80-654, released January 13, 1981). As the Commission has found, the requirements of Section 307(b) may well require reassignment of a particular channel even when there is a pending application for use of the channel in its originally assigned location. *E.g., Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 20 F.C.C.2d 487, 489, *denying reconsideration* to 17 F.C.C.2d 493 (1969).

26. In sum, given the substantial shifts in population as well as the prosepct of providing a first primary service to a substantial segment of persons, Hubbard urges that the Commission must reassess its assignment of 770 kHz for I-A operation at New York City. This is no more than Section 307(b) obligates the Commission to do. As the United States Court of Appeals for the District of Columbia Circuit has said, the Commission must "reasonably respond to changing conditions" since satisfaction of the strictures of 307(b) demands that allocation of frequencies should not be "a one-time thing, for the balance of demand for service will shift among communities over time." *Pasadena Broadcasting Co. v. Federal Communications Commission*, 535 F.2d at 1051 n.39.

B. *"Reassignment" Will Promote the Policies Underlying the Commission's Clear Channel Service.*

27. It is by now axiomatic that clear channel stations were not intended to serve large urban centers but instead were meant to serve relatively rural, sparsely populated areas through clear channel stations' ability to provide secondary, or, skywave, service. As the Commission has said, clear channel stations

> are necessary for standard broadcast service to rural areas since channels which are primarily allocated for service to population centers (the so-called regional and local channels) must be shared by a multiplicity of stations and are, therefore, cluttered with interference—particularly at night when propagation conditions make interference problems more acute—to such an extent that each station provides satisfactory service only over relatively short distances where its signals are strong enough to override interference. Rural areas beyond these distances thus receive no service from such stations and must rely on the 10-to-50-kilowatt clear channel stations.

Federal Communications Commission, Seventeenth Annual Report 117 (1952); *see 1980 Clear Channel Report and Order* at 1103. Indeed, the Commission recently reaffirmed its commitment to such wide-area service in the *1980 Clear Channel Report and Order.* 47 P&F Radio Reg. 2d at 1112.

28. Moreover, the Commission has recognized that the clear channel stations, particularly Class I-A stations, are unique in their ability to provide secondary service over wide areas. Thus, for example, the Commission has found that only Class I stations have the potential of providing skywave service to sparsely populated areas

because only Class I stations "receive protection which enables them to render nighttime skywave service" beyond their primary service areas. *1980 Clear Channel Report and Order* at 1105.

29. However, as outlined above, the Commission has located the majority of Class I stations in the relatively densely populated areas of the Northeast. For example, 18 of the 25 nondirectional Class I-A stations, *see* Attachment 2, and 16 of the 34 more limited range Class I-B stations are located in the Northeast, *see* Attachment 5. By contrast, only 2 Class I-A, *see* Attachment 2, and 10 Class I-B stations, *see* Attachment 5, are located in the Mountain and Pacific states even though these states comprise nearly half the land area of the United States and are relatively underserved and sparsely populated.

30. Accordingly, "assignment" of 770 kHz for Class I-A operation in Albuquerque would serve the basic purpose underlying the Commission's clear channel service by bringing additional secondary service to sparsely populated areas of the West and Southwest. Indeed, engineering data submitted in the I-A application estimate a secondary service gain of 8,777,100 persons for KOB as a I-A station. *See* Attachment 6, Figure 8. Remarkably, this represents an increase of 21.7 per cent over the secondary service estimated in KOB's I-A application just three years ago. *Id.*[17]

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[17] At that time secondary service gain based on 1970 census data, showed a secondary service gain of 7,211,800. Other population comparisons are also dramatic. For example, while 627,000 persons were estimated to be within KOB's 0.5 mV/m interference-free I-A contour in 1978, 846,700 persons are now estimated to be within this contour now. *See* Attachment 6, Figure 8.

C. *No Court Decision Prohibits Grant of the Requested "Reassignment."*

31. On occasion the Commission has indicated that despite the merits of KOB's proposals, the FCC is effectively prohibited by various decisions of the United States Court of Appeals for the District of Columbia Circuit from restoring KOB to Class I status. For example, in seeking summary affirmance in the latest appeal involving KOB, the Commission asserted that it "could not grant Hubbard I-A authority, even if it wanted to" without violating the decisions of the Court leading up to the adoption of the *1976 Report and Order. Appellee's Motion for Summary Affirmance* at 12.

32. However, no decision of the Court of Appeals mandates that Hubbard be denied I-A status in the future in light of changing population patterns and a worsening of the relative disparity of service between the West and Northwest. Clearly, one applicant's status as a network may be considered, but such status cannot be made the controlling factor. Indeed, Hubbard may not be permanently denied particular radio facilities merely because the mutually exclusive applicant for similar facilities is a radio network without violating the strictures of the Communications Act as well as fundamental tenets of equal protection.

33. The Communications Act, its legislative history, and prior Commission decisions or policies, create no special, protected class for radio networks in general or ABC in particular, and the Act confers no rights on radio networks greater than those of any other applicant for radio facilities. Thus, as applicants for similar facilities, Hubbard and ABC must be judged primarily not by their status as network or non-network applicants, but, rather, according to the Commission's traditional

comparative criteria, particularly the mandate of the Communications Act that Radio facilities be licensed so as to provide a "fair, efficient, and equitable distribution of radio service" among the several states. 47 U.S.C. § 307(b) (1970).

34. Moreover, the creation by the Commission or the court of a special class of network applicants would violate fundamental tenets of equal protection. *U.S. Const.* amend. V. Basic to the idea of equal protection is the notion that the government may not

> make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed.

Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U.S. 96, 105 (1899). As stated above, the purported distinction between ABC and Hubbard – that one is owned by a network and the other is not – has no basis in the language or legislative history of the Communications Act and no basis in any other decision or policy of the Commission. Accordingly, ABC or any other network is not automatically entited to clear channel facilities merely because of its status as a network, and Hubbard may not be permanently proscribed from seeking a Class I-A facility solely because the other applicant on 770 kHz owns and operates a radio network.

35. WABC, just as any other applicant, may seek a Class I- . station on any other clear channel frequency. As this court has stated, there is a variety of ways in which WABC might be accommodated, including the

filing by WABC of "competitive applications when present licensees on other frequencies seek renewal." *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 280 F.2d 631, 636 (D.C. Cir. 1960).

36. To decide otherwise would be to grant WABC a permanent license to a Class I-A station even though the Communications Act confers no extraordinary rights to facilities on radio networks apart from the rights of any other applicant. In fact, it has long been held that no Commission licensee "obtains any vested interest in any frequency" through the grant of a Commission license to operate. *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 331 (1945); *accord Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *see also* 47 U.S.C. §§ 301, 303(m), 307(d) (1970).

37. Moreover, if the court's decisions mandate that Hubbard may never be given I-A facilities, even in light of changing conditions, because of ABC's status as a radio network, then they also mandate that no one can ever displace ABC—even with an application specifying I-A operation in New York City—as the licensee of WABC. That is, under the Commission's apparent reading of the court's decision, as long as ABC maintains a radio network, it is automatically and absolutely authorized to be awarded a I-A "flagship" station in New York if other radio networks happen to operate such facilities.

38. Not only is such a reading inconsistent with the Constitution and the Communications Act, but it can lead to ludicrous and unworkable results. For example, if a network has a right to a I-A "flagship" station, the Mutual Broadcasting System, which recently acquired Class II station WHN in New York, is entitled to demand

and receive Class I-A status. Likewise, any existing or future radio network could presumably demand a Class I-A facility.

39. Finally, even considering ABC's status as a network, it can hardly be said that ABC will suffer an unfair disadvantage if WABC is displaced as the I-A station on 770 kHz. Since the court's 1965 decision, ABC has established and operated four radio networks. *Proposal of American Broadcasting Co.'s Inc., to Establish Four New Specialized "American Radio Networks,"* 11 F.C.C.2d 163 (1967).[18] Indeed, as of 1979, ABC had at least 1506 radio affiliates as compared to approximately 299 affiliates for CBS and 282 for NBC. *Broadcasting Yearbook* D-22-D-41 (1980 vol.). Moreover, ABC's networks have shown significant growth since the Commission's *1976 Report and Order.* In fact, since 1976 ABC has added approximately 106 radio affiliates, an increase of about 7.57 per cent. *Broadcasting Yearbook* D-23-D-30 (1977 vol.).

40. Further, ABC can claim no particular disadvantage as to wide-area skywave coverage by high-power Class I stations. Of network-affiliated Class I stations, 16 are affiliated with ABC as compared to 16 for CBS and 15 for NBC. Attachments 2 and 5. This represents two additional Class I affiliates (WOR, New York and KAAY, Little Rock) since the *1976 Report and Order. Compare Broadcasting Yearbook* D-23-D-30 (1977 vol.).

41. It should also be emphasized that KOB's I-A operation would help alleviate a serious disadvantage to the NBC radio network in the Mountain and Pacific states. Both CBS and ABC have I-A affiliates in the

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[18] In 1965, ABC had only 431 radio affiliates. *Broadcasting Yearbook* E-8 (1966 vol.).

West, but NBC has no such affiliate. Attachments 2 and 5. Moreover, while NBC has only one I-B affiliate in the West, ABC has 4 I-B affiliates in the West and CBS has 5. Thus, KOB, an NBC affiliate, would provide an important second skywave signal for NBC and NBC's first I-A skywave signal in the West. *See 1976 Report and Order* at 44.

IV. Conclusion

42. In summary, Hubbard submits that the Commission should "reassign" 770 kHz so as to allow Class I-A operation in Albuquerque. The dramatic shifts in population away from the Northeast and toward the West as well as the continuing comparative lack of service in the West mandate that the Commission reassess its earlier "assignment." Moreover, "reassignment" would serve the ultimate interests of the Commission's clear channel rules.

WHEREFORE, the premises considered, Hubbard Broadcasting, Inc., respectfully requests that Section 73.22 of the Commission's rules be amended to specify operation by a Class I-A station on 770 kHz in Albuquerque, New Mexico.

Respectfully submitted,

HUBBARD BROADCASTING, INC.

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By _____
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By /s/ Robert L. Pettit

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March 9, 1981

CERTIFICATE OF SERVICE

I, Ruth B. Yates, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that copies of the foregoing "Petition for Rulemaking" were sent this 9th day of March, 1981, by first-class United States mail, postage prepaid, to the following:

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APPENDIX D

COMMUNICATIONS ACT OF 1934, AS AMENDED

TITLE 47 U.S.C.

Title IV– Procedural and Administrative Provisions

SEC. 402

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

Right to appeal

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been

denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

Filing notice of appeal; contents; jurisdiction; temporary orders

(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirma-

tive or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

Notice to interested parties; filing of record

(d) Upon the filing of any such notice of appeal the Commission shall, not later than five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the city of Washington. Within thirty days after the filing of an appeal, the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

Intervention

(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected

by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

Record and briefs

(f) The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

Time of hearing; procedure

(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009(e) of Title 5.

Remand

(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

Judgment for costs

(i) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of

the issues involved upon said appeal and the outcome thereof.

Finality of decision; review by Supreme Court

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section. June 7, 1934, c. 426, 48 Stat. 926; June 19, 1934, c. 652, Title IV, § 402, 48 Stat. 1093; May 20, 1937, c. 229, §§ 11–13, 50 Stat. 197; May 24, 1949, c. 139, § 132, 63 Stat. 108; July 16, 1952, c. 879, § 14, 66 Stat. 718; Aug. 28, 1958, Pub. L. 85–791, § 12, 72 Stat. 945.